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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 685 41

NORTHERN COAL & DOCK COMPANY AND GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., OF PERTH, SCOTLAND,

Petitioners,

vs.

EMMA STRAND AND INDUSTRIAL COMMISSION OF WISCONSIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN AND BRIEF IN SUPPORT THEREOF.

LOUIS QUARLES,
CHAS. B. QUARLES,
LYMAN T. POWELL and
JOHN S. SPROWLS,
Attorneys for Petitioners.

SUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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NORTHERN COAL & DOCK COMPANY AND GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., OF PERTH, SCOTLAND,

Petitioners,

vs.

EMMA STRAND AND INDUSTRIAL COMMISSION OF WISCONSIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

To the Honorable, The Supreme Court of the United States:

Your petitioners, Northern Coal & Dock Company, a corporation organized under the laws of Ohio and licensed to do business in Wisconsin, and General Acci-

dent, Fire & Life Assurance Corporation, Ltd., of Perth, Scotland, a foreign corporation licensed to do business as such in the State of Wisconsin, in support of this petition for writ of certiorari to be directed to the Supreme Court of the State of Wisconsin respectfully show:

That your petitioner, Northern Coal & Dock Company, is engaged in the business of mining, distributing and selling coal, and operates a coal dock on Lake Superior at the City of Superior, State of Wisconsin;

That on October 20, 1924, one Charles Strand was working as an employee of the Northern Coal & Dock Company in the hold of a steamer which was then lying at said dock in the navigable waters of Lake Superior, and that while so working as a stevedore in unloading said boat said Strand was instantly killed;

That the respondent, Emma Strand, is the widow of the deceased, Charles Strand; that said Emma Strand filed an application with the Industrial Commission of Wisconsin asking for death benefits under the Workmen's Compensation Act of Wisconsin, naming as respondents in said proceeding your petitioner, Northern Coal & Dock Company, and your petitioner, General Accident, Fire & Life Assurance Corporation, Ltd., of Perth, Scotland;

That your petitioner, General Accident, Fire & Life Assurance Corporation, Ltd., of Perth, Scotland, had written a policy of workmen's compensation insurance for Northern Coal & Dock Company, under which it was liable to respond for the amount of the compensation, if any should be assessed against its assured;

That your petitioners contested said proceeding before the Industrial Commission on the ground that the said Industrial Commission had no jurisdiction of the proceeding for the reason that the death of said Charles

Strand was the result of a maritime accident, that the admiralty and maritime jurisdiction conferred by the Constitution and Laws of the United States upon the District Courts of the United States in such cases is exclusive, and that such jurisdiction is retained by the Federal Courts by Article III, Section 2, of the Constitution of the United States;

That notwithstanding the answer of your petitioners so interposed and the objection to the jurisdiction of said Industrial Commission, as heretofore stated, said Industrial Commission did make and enter an award in favor of the said Emma Strand and against your petitioners in a sum exceeding fifty-eight hundred dollars ($5800);

That pursuant to the statutes in the State of Wisconsin your petitioners brought an action in the Circuit Court of Dane County, Wisconsin, for the purpose of reviewing and setting aside the said award and that your petitioners did allege among other things in their complaint in said action that the said Industrial Commission of Wisconsin had and has no jurisdiction of the controversy or the claim in question for the reason that the death of said Charles Strand was the result of a maritime accident, that the admiralty and maritime jurisdiction conferred by the Constitution and Laws of the United States upon the District Courts of the United States in such cases is exclusive, that such jurisdiction is retained by the Federal Courts by Article III, Section 2, of the Constitution of the United States, and that the making of the said alleged findings of fact and award herein were in violation of said Article III, Section 2, of the Constitution of the United States;

That the said Emma Strand and said Industrial Commission of Wisconsin did duly answer the said complaint and that thereafter the said action so started in the Cir-

cuit Court of Dane County, Wisconsin, came on for trial, and that after the trial thereof the said award of the Industrial Commission of Wisconsin was affirmed by a judgment of the said Circuit Court of Dane County; that thereafter your petitioners duly appealed from said judgment to the Supreme Court of the State of Wisconsin and did by their briefs and oral argument make the same contentions as are hereinbefore set forth;

That on the 3rd day of May, 1927, the Supreme Court of the State of Wisconsin filed its decision in said action, now reported in 213 Northwestern 658, wherein it did affirm the said judgment of the Circuit Court of Dane County;

That thereafter your petitioners duly filed a motion for rehearing of said decision and did duly file briefs thereon and that on the 11th day of October, 1927, the Supreme Court of the State of Wisconsin did deny said motion for rehearing with costs; that at said time Mr. Justice Stevens, one of the members of said Supreme Court, did file a concurring opinion.

Grounds Upon Which the Supreme Court Is Asked to Take Jurisdiction.

1. That the Industrial Commission of Wisconsin, the Circuit Court of Dane County, and the Supreme Court of the State of Wisconsin in deciding this case have erroneously assumed that this action is not controlled by Article III, Section 2, of the Constitution of the United States;

2. That the decision of the Supreme Court of the State of Wisconsin in this case is in direct conflict with the decision of the Supreme Court of the United States in the case of *International Stevedoring Company* v.

Haverty, 47 Sup. Ct. Rept. 19, holding that a man working as a stevedore is a seaman as the word is used in the Jones Act (Act of June 5, 1920), 41 Stat. L. 1007; is in direct conflict with the decision of the Supreme Court of the United States in the case of *Western Fuel Company* v. *Garcia*, 257 U. S. 233, holding that the widow of a stevedore who was instantly killed while working in the hold of a vessel, was rightly refused recovery under the California Workmen's Compensation Act, but was entitled to bring a libel *in personam* in the United States District Court; and is in direct conflict with other decisions of the Supreme Court of the United States holding that the compensation acts of the various states have no application to maritime accidents occurring to persons working as stevedores, to wit: *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U. S. 479, *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, *State of Washington* v. *W. C. Dawson Co.* 264 U. S. 219, *Gonsalves* v. *Morse Dry Dock & Repair Co.* 266 U. S. 171;

3. That the decision below if allowed to stand will deprive your petitioners of a large amount of money, for which they are not liable under the Laws of the United States and for which they are not liable under the Laws of the State of Wisconsin;

4. That the decision below if allowed to stand will be followed by the Supreme Court of Wisconsin as a precedent for other erroneous decisions in cases arising under similar circumstances;

That petitioners file herewith a certified transcript of the record below, as required by the rules of this court, and they have herein presented the reasons why the judgment of the Supreme Court of the State of Wisconsin should be brought here for review by the Supreme Court.

WHEREFORE, in view of the premises petitioners pray that this Honorable Court will grant its writ of certiorari directed to the Supreme Court of the State of Wisconsin requiring that the record of said cause in said court and its decree be certified to this court, and that this Honorable Court will correct the errors complained of, reverse the said decree, and remand said cause, and give unto your petitioners such other and further relief as the nature of the case requires, and to the court may seem proper.

NORTHERN COAL & DOCK COMPANY and
GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LDT., OF PERTH, SCOTLAND,
By LOUIS QUARLES,
of Milwaukee, Wisconsin, and
LYMAN T. POWELL and JOHN S. SPROWLS, of Superior, Wisconsin,
Attorneys for Petitioners.

STATE OF WISCONSIN, }
COUNTY OF MILWAUKEE. } ss.

LOUIS QUARLES, being first duly sworn, states that he is a member of counsel for Northern Coal & Dock Company and General Accident, Fire & Life Assurance Corporation, Ltd., of Perth, Scotland, petitioners herein and regularly admitted to practice in the United States Supreme Court; that he has prepared the foregoing petition; that the allegations thereof are true, as he verily believes, and that he believes said petition is proper to be filed, and that the same is not introduced for purposes of delay.

LOUIS QUARLES

Subscribed and sworn to before me this 8th day of November, 1927.

G. S. SALENTINE
Notary Public, Wisconsin.

My commission expires June 17, 1928.

STATE OF WISCONSIN, } ss.
COUNTY OF DOUGLAS. }

LYMAN T. POWELL and JOHN S. SPROWLS, being first duly sworn, state that they are members of counsel for Northern Coal & Dock Company and General Accident, Fire & Life Assurance Corporation, Ltd., of Perth, Scotland, petitioners herein and regularly admitted to practice in the United States Supreme Court; that they have prepared the foregoing petition; that the allegations thereof are true, as they verily believe, and that they believe said petition is proper to be filed, and that the same is not introduced for purposes of delay.

LYMAN T. POWELL
JOHN S. SPROWLS

Subscribed and sworn to before me this 4 day of November, 1927.

HENRY B. EVANS
Notary Public, Wisconsin.

My commission expires Feb. 15, 1931.

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OCTOBER TERM, 1927.

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NORTHERN COAL & DOCK COMPANY AND GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., OF PERTH, SCOTLAND,

Petitioners,

vs.

EMMA STRAND AND INDUSTRIAL COMMISSION OF WISCONSIN,

Respondents.

BRIEF AND ARGUMENT.

The facts in this case are not in dispute. Deceased came to his death through an accident while working in the hold of a vessel on the navigable waters of Lake Superior. He was an employee of the Northern Coal & Dock Company, which was not the owner of the boat. He and his employer were subject to the Workmen's Compensation Act of Wisconsin if that act applied to maritime accidents.

This court has frequently reviewed decisions of the Supreme Courts of the several states where those courts erroneously applied the local workmen's compensation acts and in each such case has reversed the local court for the reason that Article III, Section 2, of the Consti-

tution of the United States does not permit the states to change, modify, or affect the general maritime law. To apply the Workmen's Compensation Act to such a case would clearly work material prejudice to the characteristic features of the general maritime law and would interfere with the proper harmony and uniformity of that law.

The decision of the Wisconsin Supreme Court, which we now seek to review, cites many decisions of the United States Supreme Court which we rely on in support of our contention, but states that as Strand was instantly killed and there was therefore no liability at common law, "no question of maritime tort is therefore involved as that matter was understod at common law."

The court then states that where state statutes give a remedy for death by wrongful act and the act is done on navigable waters, courts of admiralty will enforce the liability thus created. The Wisconsin court then states:

> "Congress legislated with reference to the general subject matter of death by wrongful act in 1920. The statute contained the following provision:
>
> 'The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this act nor shall this act apply to the Great Lakes or to any waters within the territorial limits of any state, or to any navigable waters in the Panama Canal zone.' 41 Stats. L. c. 111, p. 537 (U. S. Comp. St. sec. 1251½-f.)
>
> Therefore, if any liability exists on account of the death by wrongful act of the employee, Strand, it arises under the Wisconsin Statutes, which give such a right. Section 331.03."

The Wisconsin court clearly fell into error in misconstruing the purpose and application of the Act of March 30, 1920. Long prior to the adoption of this act the Supreme Court of the United States held that death actions could be maintained under the state statutes. The sole

purpose of the Act of March 30th was to create a cause of action in death actions happening on the high seas where the local statutes were not applicable. The Jones Act of June 5, 1920, was adopted subsequently to that of March 30, 1920, and creates a cause of action for the benefit of seamen. There is nothing in the March act which in any way permits a seaman to prosecute his action under the local statutes or to recover compensation under local statutes. This court has definitely determined that a stevedore is a seaman within the meaning of the Jones Act. *International Stevedoring Co.* v. *Haverty*, 47 Sup. Ct. Rept. 19.

It cannot be questioned that the widow of the deceased in this case could prosecute a cause of action under the Jones Act. Nothing is better established than the fact that where Congress has legislated relative to maritime torts that legislation must be considered as the uniform law and that a person cannot at his election proceed under the uniform maritime law or under a local compensation act.

The exact question here involved was decided in *Western Fuel Co.* v. *Garcia*, 257 U. S. 233. In that case the deceased was instantly killed while employed as a stevedore and working in the hold of a vessel. Recovery was refused under the California Workmen's Compensation Act and this court then sustained the right of the widow to bring a libel *in personam* in the United States District Court. In that case the Supreme Court discusess *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, *Chelentis* v. *Luckenbach Steamship Co.* 247 U. S. 372, *Union Fish Company* v. *Erickson*, 248 U. S. 308, and *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, in which this court pointed out the inability of the states to change the general features of the maritime law so as to defeat uniformity, but

affirmed the power of the states to take some modifications or supplements thereto.

It seems clear to us from a reading of the decisions of this court that this court has uniformly acknowledged the right of the states to supplement the maritime law by adding thereto the right to sue for wrongful death, at the same time adhering to the rule of uniformity by not conceding the right to make local compensation acts applicable to maritime torts.

Under the Jones Act (June 5, 1920) there can be no question about the rule, as Congress has now legislated on the subject, thus precluding the right of the states to adopt contrary legislation.

Following your petitioners' motion for a rehearing Mr. Justice Stevens of the Supreme Court of Wisconsin filed a concurring opinion (R. .....) in which he expresses the opinion that the right of the widow does not grow out of an action sounding in tort, but arises out of a contract made between the employer and employee under the Workmen's Compensation Act. He concludes that the deceased was not a stevedore and states that the decisions of this court recognize the power of state courts to enforce rights under Workmen's Compensation Acts in all cases where the injured employee was neither a seaman nor a stevedore if the injuries were received upon navigable waters, citing *Grant Smith-Porter Ship Company* v. *Rohde*, 257 U. S. 469, and *Millers' Indemnity Underwriters* v. *Braud*, 270 U. S. 59.

In the Grant Smith-Porter Ship Company case the injured man was working on an incompleted vessel and this court held that he was not doing maritime work at the time.

In the Millers' Indemnity Underwriters case the injury occurred to a diver who was cutting off piles in a river

and this court held that to bring such work under the compensation act of a state did not materially affect the general maritime law. This court said:

> "The matter is of mere local concern and its regulation by the state will work no material prejudice to the characteristic feature of the maritime law."

We submit that Mr. Justice Stevens misconstrued the decisions of this court and overlooked the fact that the deceased clearly was a stevedore and was doing maritime work at the time of his injury. The test as to whether or not he was a stevedore does not depend upon the general nature of his employment, but depends upon the kind of work he was doing at the time of his injury. The admiralty jurisdiction in tort matters depends upon locality.

Waring, et al. v. *Clarke,* 5 How. 441, 459; 12 L. Ed. 226.

R. R. Co. v. *Towboat Co.* 23 How. 209, 215; 16 L. Ed. 433.

The Propeller Commerce, 1 Black, 574, 579; 17 L. Ed. 107.

The Plymouth, 3 Wall. 20, 33; 18 L. Ed. 125.

Leathers v. *Blessing,* 105 U. S. 626, 630; 26 L. Ed. 1192.

Martin v. *West,* 222 U. S. 191, 197; 32 Sup. Ct. 42; 56 L. Ed. 159; 36 L. R. A. (N. S.) 592.

Gonsalves v. *Morse Dry Dock & Repair Co.* 45 Sup. Ct. 39; 266 U. S. 171; 69 L. Ed. 228.

Robins Dry Dock & Repair Co. v. *Dahl,* 45 Sup. Ct. 157; 266 U. S. 449, 457; 69 L. Ed. 372.

We submit further that the employment contract between the Northern Coal and Dock Company and Strand did not imply an agreement to pay compensation for maritime accidents, nor an agreement by Strand or his widow to waive any right to sue under the maritime law.

As the compensation act can have no application to maritime accidents, it cannot properly be said that the parties to the contract of employment either expressly or impliedly agreed to change or extend the compensation act.

It may be said that as a part of the contract of employment the Northern Coal & Dock Company agreed to pay compensation if the employee should be injured under such circumstances as would make the compensation act apply, but it cannot be said that there was any agreement to pay compensation under any other circumstances.

In other words, the Constitution and laws of the United States are just as much a part of a contract of employment as are the laws of a state.

We respectfully submit that this case is controlled by *Southern Pacific Co.* v. *Jensen*, 244 U. S. 203, in which case this court held that the Workmen's Compensation Commission of New York had no jurisdiction to make an award in favor of the dependents of a man who was engaged in unloading a steamship because the man was injured while he was on the vessel.

Respectfully submitted,

LOUIS QUARLES,
CHAS. B. QUARLES,
LYMAN T. POWELL, and
JOHN S. SPROWLS,
Attorneys for Petitioners.